MOTION FILED
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No. 02-1348

IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

v.

RUBINA HUSAIN, individually and as personal representative of the estate of Abid M. Hanson, M.D., HANNAH HUSAIN, SARAH HUSAIN, ISAAC HUSAIN, by and through their guardian ad litem RUBINA HUSAIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE REPLY BRIEF *AMICUS CURIAE* AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN REPLY TO BRIEF *AMICUS CURIAE* OF THE UNITED STATES

Of Counsel
JAMES L. CASEY
Vice President & Deputy General Counsel
DAVID BERG
Assistant General Counsel
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 585-6900

SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
Attorneys for Amicus Curiae Air Transport Association of America, Inc.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE

The Air Transport Association of America, Inc. (the "ATA") respectfully moves to file the attached reply brief *amicus curiae* for the limited purpose of responding to arguments raised for the first time in this case by the United States in its *amicus curiae* brief in support of Respondents. Petitioner Olympic Airways ("Olympic") has given its consent for the ATA to file this brief, and Olympic's counsel has filed its verification of that consent with the Court. The ATA requested the consent of counsel for Respondents, but that consent was denied. With the consent of the parties, the ATA earlier filed a brief *amicus curiae* in support of Olympic urging reversal of the United States Court of Appeals for the Ninth Circuit. The ATA's

deep-seated interest in the case has been stated. *See* Br. of the Air Transport Association of America, Inc. as Amicus Curiae in Support of Pet'r at 2-3.

The ATA recognizes that the Rules of the Supreme Court do not provide for the filing of a reply brief by an *amicus curiae*. The ATA submits that Rule 37.4(a), prohibiting the filing of a reply brief as an *amicus curiae*, should be waived here. The United States' position, as set forth in its *amicus curiae* brief in support of Respondents, effectively rewrites the Warsaw Convention and the Montreal Convention[1] (which is currently in the process of entering into force for many countries, including the United States). The United States' brief raises fundamental problems at a very sensitive time, as countries around the world are considering whether to ratify the Montreal Convention.

Through its *amicus curiae* brief, the United States has asked the Court to rewrite the Warsaw Convention to incorporate national law in the definition of "accident," and turn the treaty into a fault-based liability scheme based upon the heightened standard of care imposed on common carriers in the United States. This is a standard of care that has never before been applied to the Warsaw Convention, and its application undermines the treaty's overriding goal of uniformity. In setting forth its position,

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[1] *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("Montreal Convention"). On July 31, 2003, the United States Senate approved the Montreal Convention. The United States has deposited with the International Civil Aviation Organization on September 5, 2003 its instrument of ratification. The Montreal Convention will enter into force on "the sixtieth day following the date of deposit of the thirtieth instruction of ratification, acceptance, approval or accession with the Depositary." *Id.*, art. 53(6). The United States was the thirtieth state to consent to be bounded by the convention. The convention will be entered into force November 4, 2003.

the United States fails to mention a recent case from the United States Court of Appeals for the Ninth Circuit which is contrary to its invocation of common-law principles. *See Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 999 (9th Cir. 2002), *cert. denied* 123 S. Ct. 1284 (Feb. 24, 2003) (holding that common-law doctrine of *forum non conveniens* cannot be applied to Warsaw Convention claims because it is contrary to the civil-law principles that form the foundation of the Convention).

The United States has advanced its unprecedented new position without consultation with the air carrier industry, the other signatory countries of the Warsaw Convention, or the countries who have ratified or are in the process of ratifying the Montreal Convention.

Since the ATA filed its original *amicus curiae* brief, this case has taken on a greater significance than the current parties and issues before the Court. Another important Warsaw Convention case is currently pending in the United States Court of Appeals for the Fifth Circuit, *Blansett v. Continental Airlines, Inc.*, Case No. 03-40545.[2] The issue there is whether an airline can be held liable to a passenger under a failure to warn theory of liability. In *Blansett*, the plaintiffs argued that an airline had a duty to warn passengers of the risk of developing deep vein thrombosis (essentially a blood clot) during long international flights. In a decision that is at odds with the weight of the international authority, the United States District Court for the Southern District of Texas held that the Warsaw Convention imposed such a duty on the defendant airline. *See generally Blansett v. Continental Airlines, Inc.*, 237 F. Supp. 2d 747 (S.D. Tex. 2002).

The Fifth Circuit held oral argument in *Blansett* on September 4, 2003. Recently, however, that court entered

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[2] The ATA also is participating as an *amicus curiae* in *Blansett*.

an Order deferring its decision until after this Court rules on the merits of this case. *See* Letter from Clerk of Fifth Circuit to Counsel of Record, *Blansett v. Continental Airlines, Inc.*, Case No. 03-40545 (Sept. 17, 2003), Appendix at 1a.

Both this case and *Blansett* are of significant concern to the airline industry. Under the Warsaw Convention, and its soon-to-be successor, the Montreal Convention, the airline industry has agreed to an unlimited strict liability regime. The District Court in *Blansett* and the Ninth Circuit below both imposed fault-based theories of liability on airlines that are incompatible with that liability regime. In doing so, these courts imposed common-law duties on the airlines that far exceed any duty previously recognized as being owed by an airline to a passenger relating to international air transportation. The ATA seeks to file the attached *amicus curiae* brief to address the concerns of its members and to correct statements of fact and law made by the United States in its *amicus curiae* brief.

The Court has previously allowed an *amicus curiae* to file a reply brief when another *amicus curiae* has raised arguments that are of substantial concern to the industry in question for the first time after the *amicus curiae* filed its original brief. *See, e.g., Alabama v. Shelton*, 535 U.S. 654, 671 (2002) (noting that National Association of Criminal Defense Lawyers filed reply brief as *amicus curiae*); *Ginzburg v. United States*, 383 U.S. 463 (1966) (*amicus curiae* Citizens for Decent Literateur, Inc. filed a reply brief in addition to an *amicus curiae* brief). The ATA submits that this case also is one where the filing of a reply brief by this *amicus curiae*, representing the interest of the U.S. air carrier industry, is appropriate.

The ATA therefore respectfully requests that the Court waive the requirements of Rule 37.4(a), and that the ATA be granted leave to file its *amicus curiae* reply brief in support of Olympic urging reversal of the court below.

Respectfully submitted,

Of Counsel
JAMES L. CASEY
Vice President & Deputy General Counsel
DAVID BERG
Assistant General Counsel
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 585-6900

SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
Attorneys for Amicus Curiae Air Transport Association of America, Inc.

TABLE OF CONTENTS

Page

Table of Contents i
Table of Authorities ii
Argument 2
Conclusion 11
Appendix 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Abramson v. Japan Airlines Co., 739 F.2d 130 (3d Cir. 1984) 10-11

Air France v. Saks, 470 U.S. 392 (1985) ..... *passim*

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) 3, 4, 12

Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002), *cert. denied* 123 S. Ct. 1284 (Feb. 24, 2003) 6

Husain v. Olympic Airways, 316 F.3d 829 (9th Cir. 2002) 7

Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997) 4

Morris v. KLM Royal Dutch Airlines, [2002] 2 A.C. 628 (H.L. 2002) 9

TREATIES

Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ..... *passim*

Montreal Convention, art. 33 5

Montreal Convention, art. 35 5

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 (note) (2000) . *passim*

Table of Authorities continued

Page(s)

Warsaw Convention, art. 17 ..... *passim*

Warsaw Convention, art. 28 ..... 5, 6

Warsaw Convention, art. 29 ..... 5, 6

RULES

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990) 4

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN REPLY TO BRIEF *AMICUS CURIAE* OF THE UNITED STATES

The Air Transport Association of America, Inc. (the "ATA"), as *amicus curiae*, files this reply brief in support of Petitioners. The brief responds to the arguments made by the United States in its Brief as *Amicus Curiae* Supporting Respondents.[1]

[1] No party to this case had any role in drafting this brief, or provided any monetary support for its preparation or filing. *See* Supreme Court Rule 37.6.

ARGUMENT

In its *amicus curiae* brief, the United States urges this Court to find that the Warsaw Convention[2] imposes on international air carriers the heightened duties and standards that traditionally have been imposed by common-law courts on common carriers in the context of negligence-based tort systems. In making its arguments, the United States urges the Court to engraft domestic common-law standards of common carrier liability on this treaty-based no fault liability system that was designed to achieve uniformity among the great variety of legal systems around the world. The Court should reject the position and interpretation offered by the United States. The Warsaw Convention itself, the Court's precedent interpreting that Convention (most notably *Air France v. Saks*, 470 U.S. 392 (1985)), and the facts of this case do not support the position advanced by the United States. If this Court should embrace that position, the effect would be to rewrite the Warsaw Convention with respect to the substantive provisions controlling air carrier liability. The ATA, therefore, urges the Court to reject the United States' position.

1. The United States seeks to impose the heightened standards of common carrier duty and liability on air carriers engaged in international air transportation. It seeks to achieve this goal by improperly expanding the definition of "accident" under Article 17 of the Warsaw Convention to require the imposition of liability every time an airline would be liable under the traditionally heightened common carrier standards. If embraced by this Court, this position would (1) undermine the uniformity

[2] The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. § 40105 (note) (2000) (hereinafter "Warsaw Convention" or "Convention").

and exclusivity of air carrier liability under the Convention that this Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), requires, and (2) contradict the non-fault-based meaning of "accident," which this Court adopted in *Saks*. In short, it would effectively overturn both *Tseng* and *Saks*, and throw the liability rules of the Warsaw system into chaos at this very critical and sensitive time for this treaty-based system.[3]

In *Tseng*, which held that the Warsaw Convention provides the exclusive remedy for a passenger injured during an international flight, this Court specifically held that the Convention operates exclusive of state law. The Court reasoned that "[r]ecourse to local law . . . would undermine the uniform regulation of international air carrier liability that the Warsaw Convention was designed to foster." *Tseng*, 525 U.S. at 161. The exclusive liability scheme created by the Warsaw Convention is fixed unless and until it is modified by the mutual agreement of the signatory nations. The United States errs in suggesting that the Court impose an extra-treaty legal construct of heightened common carrier liability on the Convention.

[3] As discussed in greater detail in the ATA's motion for leave to file this reply *amicus curiae* brief, the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 9740, S. Treaty Doc. No. 106-45 ("Montreal Convention") is currently in the process of entering into force for many countries, including the United States. When it enters into force on November 4, 2003, it will replace the Warsaw Convention as the treaty governing the duties and liabilities of those engaged in international air transportation. Many of the substantive provisions of the Warsaw Convention – including the substance of Article 17 – are being carried forward in the Montreal Convention. Accepting the United States' position of heightened air carrier liability and duty – which has never before been discussed in the context of the Warsaw Convention – would put the future of that Convention, as well as its successor, the Montreal Convention, at risk.

In urging the Court to adopt the heightened obligations imposed by the courts of this country upon common carriers, the United States focuses on duty, industry standard of care, and foreseeability, all of which are negligence-based concepts developed by common-law jurisprudence. Common-law theories of liability that have developed in this country and other common law systems cannot be read into this international convention, which was designed to achieve uniformity among the diverse legal systems of the world. *See Tseng*, 525 U.S. at 16-70; *see also Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997) ("[W]e think it unlikely that the drafters intended that the initial 'accident' inquiry be resolved by reference to negligence."). It is particularly problematic to alter the duties and liabilities imposed by the Warsaw system now when the Montreal Convention is at such a critical stage in its adoption process.

The common carrier theory of heightened duty proposed by the United States as falling within the scope of an Article 17 "accident" under the Warsaw Convention is a common law, negligence-based theory of fault. The courts of various states of this country and other common law countries adopted this heightened duty from the common law courts of Great Britain. *See generally* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1157-1169 (1990) (explaining common-law historical background of heightened standard of care for common carrier liability).

In contrast to common-law liability which might be imposed on companies engaged in domestic transportation, liability for personal injury or death in the course of international air transportation is governed exclusively by Article 17 of the Warsaw Convention. There is no mention in Article 17 or elsewhere in the Warsaw Convention (or in the Montreal Convention) that the heightened standard of

care imposed by common law courts should be applied in any way on international air transportation liability. The Court should reject the United States' suggestion that it read this substantive local law into this treaty-based system.

Article 17 contains no direction to the forum court to apply its local substantive law of carrier liability. In stark contrast, two other provisions of the Convention do instruct the forum court to apply local law – Articles 28 and 29. Both of these articles concern procedural issues: Article 28 addresses the forum in which a Warsaw Convention claim may be brought and the law to be applied in the chosen forum; Article 29 provides a statute of limitations of Warsaw Convention claims. Paragraph 2 of Article 28 provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." Warsaw Convention, art. 28(2). Similarly, paragraph 2 of Article 29 provides that the "method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." *Id.* at 29(2). The references to local law for these procedural provisions are carried forward in the Montreal Convention. *See* Montreal Convention, arts. 33(4) & 35(2).

No similar language in Article 17 of either the Warsaw or the Montreal Convention directs the court to apply the local law when determining whether a passenger has met his or her burden of establishing that the threshold accident occurred, as the United States would have this Court do in this case. The Convention's drafters clearly knew how to direct the courts to local law when they deemed the application of local law appropriate. And, those drafters chose not to do so in Article 17 or any other substantive provision of the Convention. It would make little sense for a treaty system that has a principal goal of uniformity regarding liability standards to allow one jurisdiction to impose liability based upon a local (or

national) common law standard of care, and another jurisdictiont to find that no liability based upon a different standard of care.

Nothing in the history of the Warsaw Convention suggests that common-law theories of liability should be employed to implement or interpret its provisions. In a case that the United States failed to acknowledge in its brief, the United States Court of Appeals for the Ninth Circuit recently concluded that the "continental jurists" who drafted the Warsaw Convention meant to recognize only civil (codified) law, as opposed to common law, in the interpretation of the Convention's rules. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 999 (9th Cir. 2002), *cert. denied* 123 S. Ct. 1284 (Feb. 24, 2003). The Ninth Circuit found it "unreasonable to infer that the 'continental jurists,' would have succumbed to the British, common law point of view." *Id.* (internal citation omitted). Like the procedural common law issue addressed in *Hosaka* (*forum non conveniens*), the common law legal principle urged by the United States here derives from "the British common law point of view." The ATA disagrees with the holding in *Hosaka* as it applies to areas where the Convention specifically and expressly defers to national law, such as Articles 28 and 29,[4] the drafters of the Convention never intended that constantly evolving substantive common law should determine the meaning of the treaty's essential terms.

Regardless of the policy reasons for imposing a heightened duty of care on common carriers in the United States, nothing in the Warsaw Convention (or in the Montreal Convention) suggests that it should apply here.

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[4] Following the Ninth Circuit's decision in *Hosaka*, the defendant airline filed a Petition for a Writ of *Certiorari* from this Court, which the ATA supported as *amicus curiae*. The United States took no position on that Petition, which this Court denied earlier this year. *See Hosaka v. United Airlines, Inc.*, 123 S. Ct. 1284 (Feb. 24, 2003).

Allowing a court to engage in the common-law jurisprudence applied in the United States but not in all signatory States will lead directly to the very result the Convention was intended to avoid – the application throughout the world of numerous and diverse tests of liability based on the substantive law of the forum chosen by the plaintiff. The ATA, as *amicus curiae*, urges the Court to reject the United States' position.

2. To tempt the Court to reach a holding that is tantamount to overturning both *Tseng* and *Saks* and to accept instead its tortured interpretation of the Warsaw Convention's treaty-based system of liability, the United States ignores the traditional warning that bad facts make bad law and even makes them appear worse than they actually are. The United States incorrectly declares that Olympic failed to respond properly to an illness that a passenger developed during the course of the flight and that Olympic failed to properly respond to a "medical crisis." Br. of United States at 18, 26. Based upon this mischaracterization of fact, the United States submits that "[c]ommon carriers have traditionally been understood to have a duty to come to the aid of passengers who suffer illness or injury while in transit." *Id.* at 13.

This is not a case where an airline failed to respond properly to a passenger's medical emergency; rather, it is a case where an airline was held liable *for failing to prevent* a medical emergency from arising. The evidence at trial established that the passenger, Dr. Abid M. Hason, had a history of asthma long before he even made his travel plans or stepped aboard the airplane in Athens. *See Husain v. Olympic Airways*, 316 F.3d 829, 832-33 (9th Cir. 2002), Petitioner"s Appendix[5] at 4a-5a. The courts below held

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[5] Hereafter citations to the Appendix filed by Olympic are cited as "Pet. App. at ___."

Olympic liable for refusing to move his assigned seat further away from the smoking section upon his wife's three request. Each request, which the courts below found to constitute an Article 17 "accident," was made before Dr. Hanson was in any medical emergency.[6]

At the time of each request, there was no "medical crisis" as the United States would have this Court believe, nor did Olympic refuse "to assist an ill passenger" or a "stricken passenger[]." Br. of United States at 18, 20 & n.10. At most, when Dr. Hanson's wife made the third and final request, the smoke was "bothering" him and perhaps making him uncomfortable. When Dr. Hanson and his wife failed to accept Olympic's offer that they ask other passengers to voluntarily switch seats with him, Olympic was certainly justified in believing that the smoke only made him uncomfortable and did not present a medical emergency.

The United States' version of the facts evidences the weakness of its argument. The facts and legal issue presented by this case can be stated simply – is the threshold requirement of "accident" met for Article 17 liability when a passenger's pre-existing medical condition is aggravated by exposure to a normal condition in the

[6] Upon boarding the plane and before there was any cigarette smoke in the passenger cabin to aggravate his pre-existing asthmatic condition, Dr. Hanson's wife asked a flight attendant to reassign him to a non-smoking seat further away from the smoking section. *See id.* The flight attendant refused. Before the airplane took off and again before there was any cigarette smoke on the airplane, Dr. Hanson's wife asked again that he be moved to a different seat, but was refused once again. *See id.* at 834 n.5, Pet. App. at 7a n.5. Shortly after the airplane took off, passengers in the smoking section began to smoke, and the smoke began to "bother[]" Dr. Hanson. *Id.* at 834, Pet. App. at 7a. His wife again asked the same flight attendant to move him, and the attendant again refused, but offered his wife the alternative option of asking other passengers if they would voluntarily switch seats with him. *See id.*

aircraft cabin, *even assuming the air carrier could have attempted some measures to prevent* the aggravation of the passenger's pre-existing medical condition? As developed at length in Olympic's briefs and the original *amicus curiae* brief of the ATA, the answer is clearly "No," but the expansive argument of the United States nonetheless puts the Warsaw liability regime at risk.

3. This Court's precedent is clear that there can be no recovery under the Warsaw Convention when a passenger suffers injury or death from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. *Saks* further teaches that the "accident" inquiry focuses solely on the "nature of the event which caused the injury rather than the care taken by the airline to avert the injury." *Id.* at 406-07. As discussed in the ATA's original amicus curiae brief, *Saks* has been followed by the courts of this country and other countries.[7] To find liability here would be to overturn *Saks*.

Second-hand cigarette smoke in the passenger cabin of an aircraft is a "usual, normal, and expected" condition for an international air flight that allows smoking.[8] Thus, the facts of this case – failing to prevent aggravation of a pre-existing asthmatic condition by a normal and expected

[7] The *Saks* definition of "accident" under Article 17 is now accepted world-wide. *See, e.g., Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628, ¶ 71 (H.L. 2002).

[8] Dr. Hanson had the option of flying on a carrier that did not allow smoking on board. U.S. flag carriers, for example, did not allow smoking on board international flights at the time in question. Dr. Hanson chose instead to fly on an airline that necessarily exposed him to cigarette smoke. There is no evidence in the record below that he made any effort to change his travel plans once he learned on the original leg of his flight that Olympic allowed smoking on international flights.

condition on the aircraft leading to a passenger's death – fits squarely into the Saks line of cases.

Although the United States recognizes the validity of *Saks* and its progeny, *see* Br. of the United States at 16, the United States follows that recognition with the absurd suggestion that the carrier is liable under the Warsaw Convention when there is "death or bodily injury resulting from an airline's response to [a passenger's] medical condition." *Id.* at 17. As discussed above, that statement is not supported by the facts of this case. The United States apparently believes that the *Saks* line of cases simply do not apply when an airline fails to take action to prevent a passenger's pre-existing medical condition from developing into a medical emergency. It would turn the decision of this Court in *Saks* on its head to impose such duty and liability standards on an airline.[9]

As the Third Circuit held in a case that this Court cited with approval in *Saks*, "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Abramson v. Japan Airlines, Co., Ltd.*, 739

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[9] The United States is asking the Court to require airlines to undertake *a duty to prevent* passengers from becoming ill while on the flight, a duty that the Court expressly rejected in *Saks*. *See Saks*, 470 U.S. at 406-07 (holding that the "accident" inquiry focuses solely on the "nature of the event which caused the injury rather than the care taken by the airline to avert the injury"). The United States apparently would have all airlines give passengers detailed health questionnaires before they boarded the planes so that a passenger with a headcold is not seated near the engines to prevent illness caused by depressurization or that a passenger with a smoke allergy is not seated near the smoking section. Under the United States' position, whenever a passenger complains about smoke, the airline would have to undertake detailed questioning of the passenger to determine if the passenger merely dislikes the second-hand smoke or whether the passenger truly has a pre-existing medical condition.

F.2d 130, 132-33 (3d Cir. 1984) (cited in *Saks*, 470 U.S. at 404-05). In *Abramson*, the passenger claimed – as the plaintiffs did here – that the refusal to aid him was "unusual and unexpected" and thus an Article 17 accident. *Id.* at 132. The Third Circuit properly found that absent "proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17." *Id.* at 133. As this Court already held in *Saks*, the Third Circuit's decision in *Abramson* states the correct rule of law for air carrier liability under the facts of this case.

The United States' suggestion that the Warsaw Convention can be interpreted to impose an affirmative duty on airlines and their employees is directly contrary to a liability regime based upon "accidents." Such a duty would overturn the holding in *Saks* that the "accident" inquiry focuses solely on the "nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." *Saks*, 470 U.S. at 406-07. The critical language of Article 17 from the Warsaw Convention – imposing air carrier liability only when there has been an "accident"– is being carried forward in the Montreal Convention. That language was written into this new Convention with the understanding that the *Saks* definition would carry forward. To change the definition and impose significant new duties on airlines at this critical stage would threaten the continued viability of the Warsaw Convention and acceptance of its successor, the Montreal Convention. The ATA urges the Court to rejected the unsupported interpretation offered by the United States.

CONCLUSION

The United States urges the Court to apply common law jurisprudence to the treaty-based legal regime of the Warsaw Convention. The Court should reject the United

Sttaes' invitation to expand the *Saks* definition of "accident" beyond recognizable form. The ATA urges the Court to reject the United States' invitation to completely rewrite the Warsaw Convention. The only decision here that retain the viability of *Tseng* and *Saks* and that honors the international agreement reached in the Warsaw Convention and the agreement that is about to be reached in the Montreal Convention, is to reverse the decision of the United States Court of Appeals for the Ninth Circuit below. To do so, the Court need do no more than affirm the continued viability of its decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), and *Air France v. Saks*, 470 U.S. 392 (1985). The Air Transport Association of America, Inc., as *amicus curiae*, urges the Court to do so.

Respectfully submitted,

Of Counsel
JAMES L. CASEY
Vice President & Deputy General Counsel
DAVID BERG
Assistant General Counsel
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.
1301 Pennsylvania Ave., N.W.
Suite 1100
Washington, D.C. 20004
(202) 626-4000

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 585-6900

SUZANNE L. MONTGOMERY
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
Attorneys for Amicus Curiae Air Transport Association of America, Inc.

United States Court of Appeals
Fifth Circuit
Office of the Clerk

CHARLES R. FULBURGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS, LA 70130

September 17, 2003

TO ALL COUNSEL OF RECORD

No. 03-40545 Blansett v. Cntntl Airlines Inc
USDC No. G-02-CV-61

The court advised that the above mentioned case will be held pending the Supreme Court's decision in Case No. 02-1348, Olympic Airways v. Husain, 316 F. 3d 829 (9th Cir. 2002) *cert. granted*, 123 S. Ct. 2215 (2003).

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Jann Wynne
Jann Wynne, Deputy Clerk
504-310-7688

Mr Roger Dale Townsend
Mr William Joseph Boyce
Mr James W. Erwin
Mr Andrew J. Harakas